IN THE

Supreme Court of the United States

October Term, 1948.

No. 782

CHARLES C. LOCKARD, RAY MYRE, W. E. ROBERTSON, MATT SMITH, J. L. KING, M. J. FIELDING, HARRY HIRSCHBERG, PAUL SHERMAN, ELECTRICAL ENGINEERING AND MANUFACTURING CO., SAMUEL BRAUNSTEIN, WALTER G. PETERSON, T. A. SLOPER, B. MEYER, JAMES SHEPHERD, OWEN HUNT, FRANK BUSSJAEGER, MAX SCHLOM, CLARENCE FOX, JACOB R. SLATEN and THOMAS P. WALSH,

Petitioners,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; CHARLES E. BENNETT, Director of Planning of the Department of City Planning of the City of Los Angeles; WILLIAM H. SCHUCHARDT, S. T. LEV, ROBERT E. ALEXANDER, EARL R. CARPENTER and GLEN E. HUNTSBERGER, as Members of the Board of City Planning Commissioners of the City of Los Angeles; THE BOARD OF CITY PLANNING COMMISSIONERS OF THE CITY OF LOS ANGELES; LELAND S. WARBURTON, LLOYD G. DAVIES, J. WIN AUSTIN, HAROLD A. HENRY, GEORGE P. CRONK, L. E. TIMBERLAKE, CARL C. RASMUSSEN, CHARLES A. ALLEN, PARLEY PARKER CHRISTENSEN, G. VERNON BENNETT, HAROLD HARBY, ED. J. DAVENPORT, JOHN E. RODEN, JOHN C. HOLLAND and GEORGE H. MOORE, as Members of the City Council of the City of Los Angeles; RAY L. CHESEBRO, City Attorney of the City of Los Angeles; DOE ONE, DOE TWO, DOE THREE, BOARD ONE, BOARD TWO, and BOARD THREE,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

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SUBJECT INDEX

PAGE

TABLE OF AUTHORITIES CITED

STATUTES

TEXTBOOKS

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

The petitioners, Charles C. Lockard, Ray Myre, W. E. Robertson, Matt Smith, J. L. King, M. J. Fielding, Harry Hirschberg, Paul Sherman, Electrical Engineering and Manufacturing Co., Samuel Braunstein, Walter G. Peter-

son, T. A. Sloper, D. Meyer, James Shepherd, Owen Hunt, Frank Bussjaeger, Max Schlom, Clarence Fox, Jacob R. Slaten and Thomas P. Walsh, pray that a Writ of Certiorari issue to the Supreme Court of the State of California to review the judgment of the Supreme Court of the State of California rendered in the above-entitled cause on February 1, 1949, the petition for rehearing of which was denied on February 28, 1949. The judgment of the Supreme Court of the State of California reversed the judgment of the Superior Court of the State of California in and for the County of Los Angeles rendered on the 17th day of April, 1947. The judgment of the Superior Court was affirmed by the District Court of Appeal, Division Two, on the 23rd day of April, 1948. The Superior Court, sitting without a jury, rendered its judgment, declaring invalid a zoning ordinance of the City of Los Angeles in so far as it pertained to petitioners' property and property similarly situated. The judgment of the trial court declared the ordinance as it applied to petitioners' property as invalid, arbitrary, discriminatory, confiscatory and that it deprived the parties of their property without due process of law and held that the ordinance in so far as it pertained to the petitioners' property was unconstitutional and void. The judgment enjoined the City of Los Angeles from enforcing the ordinance. The Supreme Court in its decision of February 1, 1949, reversed the judgment of the Superior Court, declaring the ordinance valid and constitutional.

Jurisdiction.

This court has jurisdiction under Title 28 of the United States Code Annotated, Section 1257, Subdivisions 2 and 3.

A certified transcript of the record in the case, including the proceedings in the Supreme Court of the State of California and the decision of that court and the dissent thereto, is furnished herewith and in compliance with Rule 38 of the rules of this court.

Summary of Statement of Matters Involved.

The petitioners were owners or lessees of certain parcels of property contained in a twelve-block strip on Jefferson Boulevard between Crenshaw and Vineyard in the City of Los Angeles and were using their properties for light industrial purposes. The City of Los Angeles, by its Ordinance No. 90500, which became effective on June 1, 1946, adopted a Comprehensive Zoning Plan whereby the entire city was divided into residential, commercial and industrial zones. The ordinance provided for various classes within the zones and among them a C-2 or commercial zone and an M-1 or light industrial zone. By this ordinance, a portion of Jefferson Boulevard (consisting of a twelve-block strip from Crenshaw Avenue west to Vineyard) was placed in a C-2 zone and a portion of Jefferson Boulevard (a twelve-block strip from Vineyard west to Cochran Avenue) was placed in an M-1 zone. Jefferson Boulevard is a continuous street and both strips of land are identical.

The property to the west of petitioners' property was zoned M-1 for light industrial use and petitioners sought to have their property, identical in nature, similarly zoned. Petitioners contended the only use to which their property could be put was light industrial. The City of Los Angeles refused to change the zone or to grant a zone variance and petitioners brought this action in the Superior Court, contending that the ordinance in so far as it applied to petitioners' property was discriminatory, confiscatory and unconstitutional; that it was depriving the petitioners of their property without due process of law in violation of Amendments V and XIV of the Constitution of the United States and Sections 1 and 14 of Article I of the Constitution of the State of California.

The trial court found the allegations of petitioners' complaint true and found that petitioners' property was suitable only for light manufacturing purposes such as was permitted in Zone M-1; that petitioners' property could not be used for commercial purposes; that the City of Los Angeles discriminated as to petitioners' property when it zoned said property C-2; that petitioners' property as C-2 had little or no value but had a great value if zoned M-1; that the City of Los Angeles, by refusing to permit petitioners to use their property for light industrial purposes, was depriving petitioners of their property without due process of law; that the City of Los Angeles had acted arbitrarily and that the ordinance in so far as it pertained to petitioners' property was unfair and unreasonable and that the City of Los Angeles should be enjoined from enforcing the ordinance.

Questions Presented.

Question 1. Does an appellate or reviewing court have the right to ignore the findings of fact of a trial court whether a zoning ordinance is unconstitutional as applied to petitioners' property when such findings of fact are made on conflicting evidence?

Question 2. Where a trial court makes findings of fact substantiated by the evidence that petitioners' property is suitable only for light industrial purposes, that the use of the property for light industrial purposes will not adversely affect the public health, welfare or morals, and that the property is practically valueless for commercial purposes, must not the court conclude as a matter of law from these findings that the ordinance as it affects petitioners' property is arbitrary, confiscatory, discriminatory and therefore unconstitutional and in violation of the United States Constitution, Amendments V and XIV, and Sections 1 and 14 of Article I of the Constitution of the State of California?

Question 3. Where a trial court determines on conflicting evidence that a zoning ordinance as it pertain to petitioners' property is arbitrary, discriminatory, confiscatory and oppressive and that the application of the ordinance has no reasonable relation to the public welfare and that the exercise of the police power is unreasonable and unwarranted and that the reasonableness of the ordinance is not fairly debatable, must not the Supreme Court as a matter of law conclude that the ordinance as applied to the petitioners' property is unconstitutional as being in violation of the United States Constitution, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I?

Question 4. Does a court have the right to determine whether the scheme of classification and districting is arbitrary or unreasonable and does the court have the power to set aside the decision of the zoning authorities if it finds that the regulations have no reasonable relation to the public welfare and that there has been an unreasonable, oppressive and unwarranted interference with property rights in the exercise of the police power?

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

The discretionary power of this court is invoked upon the following grounds:

1. That the Supreme Court of the State of California has decided a question of substance relating to the Constitution of the United States and the rights guaranteed thereunder in violation of Amendments V and XIV of the Constitution of the United States.

2. That the Supreme Court of the State of California has decided a question of substance relating to the Constitution of the State of California and in violation of Section 1 and Section 14 of Article I of the Constitution of the State of California.

3. That the Supreme Court of the State of California has decided an important question of local law in a way in conflict with applicable local decisions.

4. That the Supreme Court of the State of California has decided an important question of general law in a way untenable and in conflict with the weight of authority.

5. That the Supreme Court of the State of California has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

6. That the Supreme Court of the State of California has decided a zoning case in conflict with other decisions in like matters in the State of California and at variance with the decisions of this court.

7. That in the past few years zoning has become a major problem in cities throughout the United States and various decisions of state courts, as well as this court, are in conflict with each other, many of these decisions using loose language, and it is necessary to have the law settled for the guidance not only of the courts in the various states, but of the various legislative bodies as to zoning rights and powers.

8. That the decision of the Supreme Court is a determination that the will of the legislature is supreme and is not subject to review by the courts regardless of the arbitrary and unreasonable character of such legislative will.

9. That Justice Carter of the Supreme Court of the State of California, in the dissenting opinion, concurred in by two other Justices, stated:

> "I do not consider the holding of the majority decision the announcement of a rule of law, but that it simply amounts to a dogmatic declaration that in the zoning field the will of legislative body is supreme. This never has been and never should be, the law of this State."

10. That the dissenting opinion concurred in by three of the seven Justices of the Supreme Court of the States of California and the three Justices of the District Court of Appeal, determined that the rights of the petitioners were being abrogated in violation of the Constitution of the United States (Amendments V and XIV) and the Constitution of the State of California (Sections 1 and 14

of Article I) and that the petitioners were being deprived of their property without compensation and without due process of law.

11. That the dissenting opinion of the Supreme Court of the State of California, in viewing the decision of the majority of that court, stated: "When such a thing occurs, I am constrained to question the soundness of the oft-repeated adage that 'ours is a government of law—not men.'"

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

ALBERT H. ALLEN,
HYMAN GOLDMAN,
Attorneys for Petitioners.

State of California, County of Los Angeles—ss.

Albert H. Allen, being duly sworn, deposes and says:

That he is the attorney for the petitioners herein, that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

ALBERT H. ALLEN.

Subscribed and sworn to before me this 5th day of May, 1949.

LENORE HARRIS,
Notary Public in and for Said County and State.

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Respondents.

BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

The opinion of the Supreme Court of the State of California was rendered on the 1st day of February, 1949, and was reported in 33 A. C. No. 14 (p. 427), 202 P. 2d 38, and appears in the record filed herewith at pages 159

to 179. The opinion of the District Court of Appeal of the State of California was rendered April 23, 1948, and is reported at 85 A. C. A. 202, 192 P. 2d 110, and it appears in the record filed herewith at page 155. The findings of fact and conclusions of law of the Superior Court are in the record, pages 30-44. It would appear that the Supreme Court of California reasoned that notwithstanding the trial court's findings of fact which were amply supported by the evidence that there was no debatable question it had the right to review the facts and reach its own conclusion that the question of the reasonableness of the ordinance was debatable; that therefore it would hold this ordinance valid since its validity was reasonably debatable.

Jurisdiction.

The grounds for jurisdiction are:

1. The judgment of the Supreme Court of the State of California was entered on February 1, 1949 [R. 159]. Petition for rehearing was denied February 28, 1949.

2. The judgment was rendered in a suit involving the constitutionality of a local ordinance which the Supreme Court by its decision held to be valid. It is contended that the ordinance is repugnant to the Constitution and the laws of the United States.

3. That the decision of the Supreme Court of the State of California deprives the petitioners of their property without due process of law and violates the rights, titles and privileges of the petitioners afforded them and guaranteed to them under the Constitution of the United States, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article 1.

(4) The statute under which the jurisdiction of this Court is invoked is Title 28, United States Code, Section 344.

5. The cases believed to sustain the jurisdiction are:

Chesebro v. Los Angeles County Flood Control Dist., 59 S. Ct. 622, 306 U. S. 459, 83 L. Ed. 921;

Senior v. Braden, 55 S. Ct. 800, 295 U. S. 422, 79 L. Ed. 1520;

O'Neill v. Lerner, 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249.

Statement.

The facts are stated in the petition, pages 3 and 4.

Statutes.

The statutes under which this case arises and which are necessary to be considered are as follows: The Comprehensive Zoning Ordinance of the City of Los Angeles, No. 77,000, No. 90,500 June 1, 1946; Amendments V and XIV of the Constitution of the United States; Sections 1 and 14 of Article I of the Constitution of the State of California.

Specification of Error.

The errors which petitioners will urge if the Writ of Certiorari is allowed are that the Supreme Court of the State of California erred:

1. In reversing the judgment of the Superior Court of the State of California as affirmed by the District Court of Appeal of the State of California.

2. In holding that the ordinance adopted by the City of Los Angeles as it affects petitioners' property is valid and in holding that the City of Los Angeles, by the exercise of its police power, had the right to restrict the petitioners from using their property for light industrial purposes.

3. In holding that the City of Los Angeles properly exercised its police power when it restricted the petitioners from the use of their property for light industrial purposes after the trial court found and held:

a. That the property could not be put to the commercial use to which the City of Los Angeles restricted its use;

b. That the property was practically worthless for the purpose to which it was restricted by the City of Los Angeles;

c. That prior to the zoning by the City of Los Angeles, the property was used almost completely for light industrial purposes and that the City of Los Angeles had granted temporary zoning variances permitting the property to be used for light industrial purposes;

d. That for a period of many years, little commercial useage had taken place in the district and that the primary use of the property was for light industrial purposes;

e. That the property has a land valuation for commercial purposes of $30 per foot whereas for industrial purposes it has a valuation of $200 per foot;

f. That during the period the property has been zoned for commercial purposes, the land remained vacant and no development took place, whereas similar and identical land immediately adjoining the petitioners' property was zoned for industrial purposes and immediately developed;

g. That the property adjoining petitioners' property is identical in every respect to the property of petitioners and that the City of Los Angeles zoned the adjoining property for light industrial purposes but refused to similarly zone petitioners' property;

h. That the character and condition of the property had so changed from the original zoning as would make it unfair and inequitable to restrict the petitioners in the use of their property and that the use of petitioners' property for light industrial purposes would not be contrary to the health, welfare and morals of the public;

i. That the use of the property for light industrial purposes would not adversely affect the public health, welfare, safety or morals but, on the contrary, would enhance the public health, welfare, safety and morals;

j. That the property cannot be used for purposes other than light industrial purposes.

4. In failing to uphold the law established by the decisions of:

Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P. 2d 93, 94;

Jardine v. City of Pasadena, 199 Cal. 64, 248 Pac. 225, 48 A. L. R. 509;

In re Smith, 143 Cal. 368, 77 Pac. 180;

Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211, 237 Pac. 538, 40 A. L. R. 782;

People v. Hawley, 207 Cal. 395, 279 Pac. 136;

Pennsylvania Coal Co. v. Wahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321;

12 Cal. Jur., Supp., 164;

58 Am. Jur. 954;

Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841;

City of Hammond v. Schappi Bus Line, 275 U. S. 164, 48 S. Ct. 66, 72 L. Ed. 218;

Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281;

Polk Co. v. Glover, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6.

5. In failing to grant petitioners' motion to receive additional evidence under Section 956a of the California Code of Civil Procedure.

Summary of Argument.

The points of the argument restate the reasons relied upon for the allowance of the Writ of Certiorari (pages 6 to 8, *supra.*)

ARGUMENT.

POINT I.

The Findings of Fact of a Trial Court on Conflicting Evidence Will Control on Appeal in Determining Whether a Zoning Ordinance Is Arbitrary, Unreasonable or Unconstitutional as Applied to the Respondents' Property.

The trial court came to the conclusion that to apply the ordinance to petitioner's property would render it practically worthless. It reached this conclusion after an examination of all of the physical facts, the character of the property involved, the nature of the surrounding territory, the use to which the various parcels of property in the district were being put, trends of development and possible future development of the property. It also examined maps, charts, diagrams, heard expert witnesses and made a personal inspection of the property and the surrounding territory.

The trial court reached the conclusion that the ordinance as applied to petitioners' property rendered the ordinance arbitrary, confiscatory, discriminatory and therefore unconstitutional. This ordinance was in violation of petitioners' property rights and in violation of the United States Constitution, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I.

The rule of law has been stated by this court time and time again. The Appellate and Supreme Courts of California as well as this court have repeatedly held that an appellate or reviewing court will not weigh conflicting evidence but will accept the trial court's findings of fact unless such findings are manifestly not supported by the evidence. This court has always considered the trial court

as best suited to determine factual questions involved in constitutional law issues and has stated that it will be guided by the findings of the trial court. See:

Chastleton Corporation v. Sinclair, 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841;

City of Hammond v. Schappi Bus Line, 275 U. S. 164, 48 S. Ct. 66, 72 L. Ed. 218;

Borden's Farm Products Co. v. Baldwin, 293 U. E. 194, 55 S. Ct. 187, 79 L. Ed. 281;

Polk Co. v. Glover, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6;

49 Harv. L. Rev. 631;

38 Harv. L. Rev. 6;

21 Am. Bar Assn. J. 805.

Zoning cases are no exception to this universal rule of law and an examination of the cases on zoning and even those cited by the Supreme Court of the State of California in the majority opinion do not hold to the contrary. (*Skalko v. City of Sunnyvale,* 14 Cal. 2d 213, 93 P. 2d 93, 94 and *Jardine v. City of Pasadena,* 199 Cal. 64, 248 Pac. 225, 48 A. L. R. 509.) In the *Skalko* case the court held:

> "The question, therefore, is whether under the facts shown by the appellant his rights are now being invaded by the existence and maintenance of the ordinance."

It has always been the law that before an appellate tribunal will reverse a judgment it must appear from the record, that accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears

that the law precludes the prevailing party from recovering a judgment.

Macauley v. Booth (1942), 53 Cal. App. 2d 757, 128 P. 2d 386;

Field v. Mollison (1942), 50 Cal. App. 2d 585, 123 P. 2d 603.

On appeal all conflicts in the evidence and doubts as to the sufficiency thereof must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged to uphold the findings.

Bristol Estate (1943), 23 Cal. 2d 221, 143 P. 2d 689.

It is respectfully submitted that the rule of law as stated by this court in the *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, is to the effect that an appellate court *will search the record to determine whether the findings are supported by any evidence.* If the findings of the trial court are supported by any evidence in the record and if those findings indicate that the application of the zoning ordinance to the property in question is arbitrary and discriminatory, then the ordinance will be held to be unconstitutional. This basic question remains the same in all cases including zoning cases. The question therefor is as stated in *Skalko v. City of Sunnyvale, supra:*

> "The question, therefore, is whether *under the facts shown by the appellant,* his rights are now being invaded by the existence and maintenance of the ordinance." (Italics ours.)

Given the facts as they appear in the trial court's findings, the question on appeal is, whether under such facts the zoning ordinance is unreasonable, arbitrary and discriminatory and therefore unconstitutional as applied to the petitioner's property.

POINT II.

Where a Trial Court Determines on Conflicting Evidence That a Zoning Ordinance as It Pertains to Petitioners' Property Is Arbitrary, Discriminatory, Confiscatory and Oppressive, and That the Application of the Ordinance Has No Reasonable Relation to the Public Welfare and That the Exercise of the Police Power Is Unreasonable and Unwarranted and Reaches the Conclusion That the Reasonableness of the Ordinance Is Not Fairly Debatable, the Appellate or Reviewing Court Must Conclude as a Matter of Law That the Ordinance as Applied to Petitioners' Property Is Unconstitutional.

The trial court made certain basic findings of fact and these were amply substantiated by the evidence. It found:

A. That the property could not be put to the commercial use to which the City of Los Angeles restricted its use;

B. That the property was practically worthless for the purpose to which it was restricted by the City of Los Angeles;

C. That prior to the zoning by the City of Los Angeles, the property was used almost completely for light industrial purposes and that the City of Los Angeles had granted temporary zoning variances permitting the property to be used for light industrial purposes;

D. That for a period of many years, little commercial usage had taken place in the district and that the primary use of the property was for light industrial purposes;

E. That the property has a land valuation for commercial purposes of $30.00 per foot whereas for industrial purposes it has a valuation of $200.00 per foot;

F. That during the period the property has been zoned for commercial purposes, the land remained vacant and no development took place, whereas similar and identical land immediately adjoining the petitioners' property was zoned for industrial purposes and immediately developed;

G. That the property adjoining petitioners' property is identical in every respect to the property of petitioners and that the City of Los Angeles zoned the adjoining property for light industrial purposes but refused to similarly zone petitioners' property;

H. That the character and condition of the property had so changed from the original zoning as would make it unfair and inequitable to restrict the petitioners in the use of their property and that the use of petitioners' property for light industrial purposes would not be contrary to the health, welfare and morals of the public;

I. That the use of the property for light industrial purposes would not adversely affect the public health, welfare, safety or morals but, on the contrary, would enhance the public health, welfare, safety and morals;

J. That the property cannot be used for purposes other than light industrial purposes.

From these basic findings the trial court concluded that the exercise of the police power was unreasonable and therefore arbitrary, discriminatory and was a deprivation of the petitioners' property rights. It is the province of the trial court to determine issues of fact and the trial court reached the conclusion that the reasonableness of the ordinance was not fairly debatable. This finding of fact is binding on the appellate court. The evidence fully sustained the findings of the trial court that to apply the ordinance to plaintiff's property would render it practically worthless and this finding of fact is binding on the appellate or reviewing court.

In re Smith, 143 Cal. 368, 77 Pac. 180;

Pacific Palisades Assn. v. Huntington Beach, 196 Cal. 211, 237 Pac. 538, 40 A. L. R. 782;

People v. Hawley, 207 Cal. 395, 279 Pac. 136;

Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P. 2d 93;

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321;

12 Cal. Jur., Supp., p. 164;

58 Am. Jur., p. 954;

Jardine v. City of Pasadena, 199 Cal. 64, 248 Pac. 225, 48 A. L. R. 509;

Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P. 2d 542;

Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479.

POINT III.

The Court Has the Right to Determine Whether the Scheme of Classifications and Districting Is Arbitrary or Unreasonable and Has the Power to Set Aside the Decision of Zoning Authorities if It Finds That the Regulations Have No Reasonable Relation to the Public Welfare and That There Has Been an Unreasonable, Oppressive and Unwarranted Interference With Property Rights in the Exercise of the Police Power.

It is respectfully submitted that the court has the right to determine whether the exercise of the police power is arbitrary or unreasonable and this power lies in the trial court. To hold otherwise is tantamount to saying that the so-called legislative determination is conclusive and may not be reviewed by the courts regardless of the arbitrary and unreasonable character of such determination.

The basic concept in both the Constitution of the United States Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I is that the ownership and occupancy of land are fundamental rights to be enjoyed by all citizens of the United States, and with the exception of the limited field in which the police power operates, these rights cannot be violated without compensation being paid to the owner. It is conceded that the exercise of the police power must be reasonable, but it is urged that the determination of whether or not it is unreasonable is for the trial court. When a trial court reaches the determination that an ordinance is unreason-

able and arbitrary and this determination is amply substantiated by the evidence, such determination is binding on the appellate court.

The ruling of the Supreme Court of California amounts in fact to a determination and the announcement of a rule of law and a dogmatic declaration that in the zoning field the will of the legislative body is supreme. As stated by Justice Carter in his dissenting opinion, *"This never has been and never should be the law of the State of California and is certainly in violation of every concept of law as enunciated by this court."* (Italics ours.)

To hold otherwise would be to take away from the trial court all of its functions and would relegate the trial court to that of a mere referee to hear the evidence and make its recommendation to the appellate or reviewing court which would have no binding effect as a factual determination. This has never been and is not now the the law. The effect of the majority decision of the Supreme Court is to hold that in zoning cases the determination of the reasonableness of the ordinance is not binding on the appellate court. If the appellate court believes that the question is debatable it may disregard the findings of fact made by the trial court. This is not the law. The only time a reviewing court can look behind the findings of the trial court is if the findings of the trial court are not supported by the evidence.

The reviewing court can only look to see if the trial court's determination that the reasonableness of the ordinance was not debatable and that reasonable minds would

not differ was supported by the evidence. It is respectfully submitted that to hold otherwise would make the legislature's decision conclusive in all cases and deprive the courts of their power and duty to review discriminatory, arbitrary and unconstitutional legislation. There will never be a case where experts called as witnesses for opposing parties will not differ. The fact that experts will differ does not mean that the proposition is debatable.

In cases involving the reformation of contracts, the language usually states that the evidence must be "clear, convincing and positive," "free from reasonable doubt" or "fully establish the facts." It must be assumed that the trial court followed these rules in arriving at its findings of fact and the appellate court should not go behind the findings to weigh the evidence.

Ford v. Ford, 44 Cal. App. 415, 186 Pac. 164;

Cox v. Woods, 67 Cal. 317, 7 Pac. 722;

Bismo v. Herzberg (1946), 75 Cal. App. 2d 25, 170 P. 2d 973;

Tomas v. Vaughn (1944), 63 Cal. App. 2d 188, 146 P. 2d 499;

Home & Farm Co. of Calif. v. Freitas, 153 Cal. 680, 96 Pac. 308.

POINT IV.

Petitioners' Motion to Receive Additional Evidence Under California Code of Civil Procedure, Section 956(a), Should Have Been Granted by the California Supreme Court.

Petitioners submitted a motion to the California Supreme Court requesting that it receive additional evidence under California Code of Civil Procedure, Section 956(a), on the ground that since the trial of the action, the property in question has further developed solely for industrial purposes and not for commercial use. The new industrial uses were shown by fifteen photographs which were appended to the motion and offered in support thereof. These photographs showed that the further development of the area in question consisted of the construction of new buildings which obviously could be used only for industrial purposes. (See photographs submitted with motion to receive additional evidence certified by Clerk of California Supreme Court.)

In 1926 the Constitution of the State of California was amended by adding Section 4¾ to Article VI which enabled the legislature to enact Section 956(a) of the Code of Civil Procedure. This section provides that appellate courts may receive additional evidence

> ". . . concerning facts occurring at any time prior to the decision of the appeal and may give or direct the entry of any judgment or order and make such further or other order as the case may require. This section shall be liberally construed to the end, among

other things, that wherever possible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

This code section is particularly applicable to cases involving zoning regulations in view of the fact that the future development of the property is of great importance in determining the proper classification thereof.

See:

Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 93, 33 P. 2d 672.

It is respectfully submitted that the fifteen photographs offered in support of petitioners' motion before the California Supreme Court additionally bore out the wisdom of the settled rule of law that the trial court's findings of fact should control on appeal though the findings are based on conflicting evidence. Admittedly there is substantial evidence to support the findings of fact of the trial court in the instant case. Further, California Code of Civil Procedure, Section 956(a), in no way detracts from the settled rule of law that the trial court's findings shall control when based upon conflicting evidence.

See:

Isenberg v. Sherman, 212 Cal. 454, 298 Pac. 1004, 299 Pac. 528.

Conclusion.

The trial court made extensive and detailed findings of fact on conflicting evidence that the property involved was suitable only for light industrial purposes and was practically worthless for commercial use. The court then concluded as a matter of law from these basic facts that the ordinance was so unreasonable and arbitrary as to be unconstitutional and in violation of the United States Constitution, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I. It is conceded that whether an ordinance is so unreasonable and arbitrary as to be unconstitutional is a question of law but the basic facts upon which the conclusion is based are for the trial court to determine.

It is a matter of great public interest to have this Honorable Court take jurisdiction of the case at bar as a guide to communities throughout the country in the matter of the exercise of their police powers in making zoning regulations. In addition, property owners throughout the country require clarification of their rights under varied and complicated zoning ordinances and regulations. This field of legislation was practically non-existent less than fifty years ago and presently nearly all owners of urban property are effected by zoning ordinances and regulations. It is respectfully submitted that the Petition for Certiorari should be granted and the issues involved determined by this Court.

Respectfully submitted,

ALBERT H. ALLEN,
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Attorneys for Petitioners.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

IN THE

Supreme Court of the United States

October Term, 1948.
No. 782.

CHARLES C. LOCKARD, RAY MYRE, W. E. ROBERTSON, *et al.*,

Petitioners,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Foreword.

Respondents respectfully submit that the substance of the petition for the issuance of a writ of certiorari in this cause relates to matters of local practice, and is an attack upon the decision of the State Court which is based upon conflicting evidence. These are matters which this Honorable Court has declared on numerous occasions that it will not consider.

Statement of the Case.

The complaint [Record pp. 1 to 24] is in two counts. The first cause of action complains of petitioners' property being placed in a commercial zone (C-2) because their property is suitable only for light manufacturing purposes such as are permitted in the M-1 zone. The second cause of action is based upon a refusal of the City Planning Commission and the City Council to change the zoning of their property from C-2 to M-1.

The petition for certiorari alleges, on page 4, that:

> "* * * petitioners brought this action in the Superior Court, contending that the ordinance insofar as it applies to petitioners' property was discriminatory, confiscatory and unconstitutional; that it was depriving the petitioners of their property without due process of law, in violation of Amendments V and XIV of the Constitution of the United States and Sections 1 and 14 of Article I of the Constitution of the State of California."

Examination of the complaint [Record pp. 1 to 24] discloses numerous allegations such as,

> "said action on the part of the City Council is confiscatory in nature and is depriving the plaintiffs of the use of their property without due process of law" [Par. XXIV, Record p. 8, fol. 13]; "that if the said property is not zoned 'M I' or they are not permitted to use their property for light manufacturing purposes, their property will in effect be confiscated, as said property is unsuitable for any other use or purpose whatsoever" [Par. XXV, Record p. 9, fol. 13]; "that such refusal on the part of said Boards and said Council to permit the plaintiffs to use said prop-

erty as prayed for in their petitions and in their appeals is divesting and depriving the plaintiffs of the use of their property and of their constitutional rights" [Par. XXIX, Record p. 10, fol. 14]; "that by adopting the maps submitted by the Planning Commission and zoning a portion of Jefferson Boulevard immediately adjacent to the property in question as Zone 'M-1' and refusing to grant similar rights to the plaintiffs, was arbitrary and was a discrimination against the plaintiffs" [Par. XXX, Record p. 10, fol. 15]; "that the ordinance * * * is depriving the plaintiffs of a valuable property right and is discriminating against the plaintiffs, and that said ordinance is void and unconstitutional" [Par. XXXIV, Record p. 11, fol. 16]; "that the enforcement of the ordinance * * * deprive the plaintiffs of vested property rights" [Par. XXXVI, Record p. 11, fol. 17]; "that the defendants * * * attempting to limit the use to which plaintiffs can put their property by the ordinance * * * is a violation of the constitutional rights of the plaintiffs and divests plaintiffs of a substantial property right" [Par. XXXVII, Record p. 11, fol. 17].

The only reference in the complaint to the Constitution of the United States is found in paragraphs XL and XLI [Record pp. 12-13, fols. 19-20]. These two paragraphs are as follows:

"XL.

That the ordinance and ordinances of the City of Los Angeles insofar as it limits the plaintiffs in the use of their property for light manufacturing purposes and prevents the plaintiffs from the use of their property for light manufacturing purposes and for any other use other than as permitted in Zone 'C2'

is void and unconstitutional and deprives the plaintiffs of the use of their properties without due process of law, and is contrary to the Constitution of the State of California and the Constitution of the United States of America, and deprives the plaintiffs of vested property rights, and deprives the plaintiffs of the use of their property for lawful purposes contrary to the guarantee provided by the Constitution of the State of California, and the Constitution of the United States of America; that such ordinances, insofar as they restrict the plaintiffs in the lawful use of their property and the use of their property for light manufacturing purposes, is in violation of the constitutional guarantee of the plaintiffs, and such ordinances are void, unconstitutional and unenforceable."

"XLI.

That such ordinances in preventing the plaintiffs from the use of their property for light manufacturing purposes, while permitting the use of other similar, adjoining, surrounding and adjacent property as that of the plaintiffs for light manufacturing purposes and the purposes to which the plaintiffs desire to use their property, are unfair, unjust, and such ordinances are void and unconstitutional and deprive the plaintiffs of rights granted to other property owners adjoining, surrounding and adjacent to the property of plaintiffs, and is in direct violation to the Constitutional guarantee of the Constitution of the State of California and of the United States of America."

No reference is made to the United States Constitution in the Findings of Fact and Conclusions of Law [Record pp. 30 to 44]; nor in the judgment entered by the trial court [Record pp. 45 to 48].

It is not claimed by petitioners that the California Supreme Court has not correctly stated the evidence upon which it arrived at the conclusion that the ordinance should be sustained as a valid legislative enactment. The gist of petitioners' contention is disclosed by the following excerpt from their brief filed in support of their petition:

> "It would appear that the Supreme Court of California reasoned that, notwithstanding the trial court's findings of fact which were amply supported by the evidence that there was no debatable question, it had the right to review the facts and reach its own conclusion that the question of the reasonableness of the ordinance was debatable; that therefore it would hold this ordinance valid since its validity was reasonably debatable." (Pet. and Br. p. 10.)

Petitioners' statement of the "Questions Presented" (Pet. and Br. p. 5) contains, in both "*Question* 1" and "*Question* 3," reference to the existence of "conflicting evidence."

In view of the limited issues thus presented, reference need only be made to the facts as stated in the opinion of the California Supreme Court, upon which it concluded that the reasonableness of the zoning regulations was not beyond the realm of legitimate debate and that therefore the ordinance should be upheld.

The opinion of the California Supreme Court [Record pp. 159 to 179] after reviewing the evidence in considerable detail, states:

> "It appears from the record in the present case that there are undisputed physical facts which sup-

port the action of the planning commission and the city council in refusing to extend the boundaries of the M-1 zone. The maps introduced in evidence show clearly and graphically that both the industrial and commercial zones are small in comparison with the surrounding residential areas; that the industrial zone is located at one end of a long narrow strip zoned for light commercial uses designed to serve the residential areas; and that the present industrial area is bordered by a railroad which does not extend along the commercial zone but runs diagonally away from it. Also, most of the property south of the M-1 zone is publicly owned and occupied for school and playground purposes and is not available for private use, whereas all the property surrounding the C-2 strip is residential in character and fairly well developed. The legislative body was entitled to consider the fact that any extension of the industrial zone would not only tend to impose added burdens on the surrounding residential areas and create undesirable conditions such as noise, smoke, and heavier traffic, but might tend to displace the existing commercial uses, and to force those uses, in turn, to encroach upon the residential areas.

[Fol. 273]: "The problem thus presented to the planning commission and city council was essentially that of determining where to draw the lines of demarcation. Plaintiffs here are not merely seeking to obtain reclassification of a number of scattered parcels, but rather are attempting to increase the M-1 area to encompass an entire additional twelve-block district, including both their own properties and the

properties of many persons not made parties to the action. Whether an industrial area should be so increased in size, and whether certain types of business uses may be permitted in sections immediately adjacent to residential areas, while manufacturing and industrial or other uses are prohibited, is primarily a matter of legislative concern and involves determinations not only of facts with respect to existing conditions in an area, but also of policy and opinion as to its future development. (See *Sunny Slope Water Co. v. City of Pasadena,* 1 Cal. 2d 87, 93.) Accordingly, in the present case, whether the twelve-block strip was suitable for commercial uses or only for light industrial purposes, whether its development would be unduly hampered by the regulations, and whether the welfare of the surrounding residential areas would be enhanced by those regulations were all questions addressed to the legislative authorities, and their decision cannot be disturbed if the matters are fairly debatable. * * *

"For the same reason the finding of the trial court that the area on Jefferson zoned M-1 is similar and identical to the area zoned C-2 is not controlling on the issue of the reasonableness of enacting the ordinance. It is well-established that similar characteristics in adjacent and surrounding areas do not necessarily preclude the zoning authorities from placing adjoining territories in different zones or justify a court in substituting its judgment for the legislative decision. (See *Reynolds v. Barrett,* 12 Cal. 2d 244, 249; *Feraut v. City of Sacramento,* 204 Cal. 687, 693; *Ex parte Hadacheck,* 165 Cal. 416, 422; *Brown v.*

City of Los Angeles, 183 Cal. 783, 787.) Moreover, the two zones were not identical in that the record and the findings show that the surrounding areas are different. It is true that similar properties lie to the north of the two strips of property, although a more substantial portion of the land lying to the north of the C-2 strip was zoned solely for single family dwellings. The properties lying to the south, however, are decidedly different. The M-1 zone, being bordered by a railroad track, is more adaptable to industrial use, and almost all of the property immediately across the railroad track is devoted to public school and playground uses. On [fol. 276] the other hand, the C-2 strip is not bordered by the railroad and, except for about three blocks (one zoned M-1 and two zoned C-2), all of the property to the south is residential in character. Most of it is zoned for single family dwellings, and a large portion of it is in use only for residential purposes. * * * [fol. 277] The only conflict in the evidence is to be found in the opinions of the witnesses as to future development of the property and as to the effect on surrounding territory of its use for various purposes. A commercial district of this type is necessarily limited as to expansion by the development of the surrounding area, and the fact that the district has developed slowly is not determinative of the reasonableness of the restrictions, since one of the bases for zoning regulations is the guidance of future development for the protection of residential areas. (See *Sunny Slope Water Co. v. City of Pasadena,* 1 Cal. 2d 87, 93.) To be effective, zoning regulations must

necessarily look to the future, and in determining what uses should be permitted in the twelve-block strip, the legislative body was, of course, entitled to consider the effect of such uses on the surrounding areas, and to weigh the possibility of injury to those areas by reason of permitting various types of activity as against the desirability of allowing such uses. In view of the various factors involved and the testimony of the experts, it is clear that the propriety of restricting the twelve-block strip to C-2 uses and its suitability for such uses were reasonably debatable, and it cannot be said that the regulations were unreasonable or arbitrary. * * *

"As we have seen, the problem presented to the zoning authorities in the present case was essentially that of determining where to draw the lines of demarcation between different zones. Various problems of wisdom and necessity are involved in such a determination, and, although there were a number of factors which, when considered together, might have justified an extension of the M-1 zone to embrace the twelve-block area, there are undisputed physical facts in the record which support the action of the planning commission and the city council in placing the strip in a C-2 zone. It is, therefore, apparent that the reasonableness of the zoning ordinance was fairly debatable, and it cannot be held that the zoning authorities acted arbitrarily."

Summary of Argument.

Respondents respectfully submit that for the reasons outlined this Honorable Court should deny the petition for certiorari filed in this cause.

1. The question of infringement of rights protected by the Federal Constitution was not properly raised in the State Courts.

2. The asserted error of the California Supreme Court in disregarding the findings of the trial court based on conflicting evidence and examining the entire record in arriving at its decision relates to a matter of State practice exclusively, as to which this Honorable Court will not concern itself.

3. The claim of error on the part of the California Supreme Court in upholding the validity of the ordinance is, in the light of the record, nothing more than a request that this Honorable Court evaluate the evidence introduced and arrive at an independent decision as to its sufficiency.

ARGUMENT.

POINT I.

The Question of Infringement of Rights Protected by the Federal Constitution Was Not Properly Raised in the State Courts.

As pointed out in the foregoing statement of the case, no mention of the Fifth or Fourteenth Amendments to the Constitution of the United States was made, either in the complaint or in the findings of fact and conclusions of law, or in the judgment of the lower court.

To allege that an ordinance is void and unconstitutional or in violation of the Federal and State Constitutions is not sufficient. In the first place, this Honorable Court is not concerned with the question of asserted conflict with the *State* Constitution. (*Miller v. Strahl,* 239 U. S. 426, 431.) As to a claim of infringement of rights guaranteed by the Federal Constitution, it is necessary that the particular clause of the Constitution of the United States relied upon be designated. (*Capitol City Dairy Co. v. Ohio;* 183 U. S. 238, 248, 249.)

The Constitution of the State of California requires that "all laws of a general nature shall have a uniform operation"; that "no person shall * * * be deprived of life, liberty or property without due process of law"; that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner"; "nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be

granted to all citizens." (Cal. Const., Art. I, Secs. 12, 13, 14, 21.) In short, the guarantees of the Constitution of the State of California and of the United States are substantially the same in these respects. Respondents feel that they may assert with confidence that the courts of California are ever zealous in protecting the constitutional rights of the individual and look to this Honorable Court for guidance in the interpretation and application of constitutional provisions. However, in practice and generally speaking, no specific reliance or consideration is given to the Constitution of the United States as distinguished from the Constitution of California in determining whether a statute or ordinance constitutes an unreasonable exercise of the police power or is discriminatory, as the applicable guarantees of both constitutions are substantially the same.

Under such circumstances, it is all the more evident that the question of infringement of rights guaranteed by the Federal Constitution was not raised in the State Courts by petitioner in the manner required in order to invoke the jurisdiction of this Honorable Court.

POINT II.

Petitioners' Claim of Error on the Part of the California Supreme Court in Reviewing the Entire Record Relates to a Matter of State Practice.

Petitioners' statement of the questions presented (Pet. and Br. p. 5) sets forth as the first question the right of a reviewing court to ignore the findings of fact of the trial court made on conflicting evidence, and as the second question substantially the same inquiry, namely, must the Supreme Court of California conclude as a matter of law from the findings made by the trial court that the ordinance as it affects petitioners' property is arbitrary, confiscatory, discriminatory and therefore unconstitutional. *"Question 3"* appears to fall within the same general category.

With regard to the matter of the trial court's findings being controlling on the appellate court, the California Supreme Court stated in the opinion, at pages 166 and 167 of the Record [fols. 269-271]:

> "* * * The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations. As applied to the case at hand, the function of this court is to determine whether the record (fol 270) shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed. (*Acker v. Baldwin,* 18 Cal. 2d 331, 344; *Sunny Slope Water Co. v. City of Pasadena,* 1 Cal. 2d 87, 94; *Feraut v. City of Sacramento,* 204 Cal. 687, 696; *Jardine v. City of Pasadena,* 199 Cal. 64, 72; *Zahn v. Board of Public Works,* 274 U. S. 325, 326; see *Reynolds v. Barrett,* 12 Cal. 2d 244, 249.)

"The findings and conclusions of the trial court as to the reasonableness of a zoning ordinance are not binding on an appellate court if the record shows that the question is debatable and that there may be a difference of opinion on the subject. The appellate courts look beyond such determinations and consider in some detail the basic physical facts appearing in the record, such as the character of the property of the objecting parties, the nature of the surrounding territory, the use to which each has been put, recent trends of development, etc., to ascertain whether the reasonableness of the ordinance is fairly debatable. (See *Wilkins v. City of San Bernardino,* 29 Cal. 2d 332, 338-339; *Acker v. Baldwin,* 18 Cal. 2d 341, 344; *Hurst v. City of Burlingame,* 207 Cal. 134, 143; *cf. Matter of Throop,* 169 Cal. 93, 97-99.) Similarly, findings which relate to matters of opinion and judgment, such as that property is 'suitable only' for certain purposes, are not controlling. (*Skalko v. City of Sunnyvale,* 14 Cal. 2d 213, 216; see *Jardine v. City of Pasadena,* 199 Cal. 64, 75.) As we have seen, matters of this type lie within the discretion of the zoning authorities, and their action will be upheld if the question is fairly debatable."

It is apparent that the California Supreme Court, in refusing to be bound by the trial court's findings merely followed the declared State practice in this type of case. This is a question which this Honorable Court will not review. (*Greenough v. Tax Assessors of City of Newport,* 331 U. S. 486, 489; *Yazoo & M. V. R. Co. v. Adams,* 180 U. S. 1, 8.)

The same is true of the contention made at page 24 of the petitioners' brief that their motion to receive additional evidence made in the California Supreme Court should have been granted.

POINT III.

Petitioners Are in Effect Requesting a Review and Evaluation of Conflicting Evidence.

Aside from the fact that petitioners' claim of error relates to matters of State practice, what petitioners are attempting apparently is to request this Honorable Court to review conflicting evidence upon the reasonableness of the ordinance.

The language found in *Railway Express Agency v. New York* (decided January 31, 1949), 93 Adv. Op. (L. Ed.) 396, in sustaining a traffic regulation of New York City, seems equally applicable to the case at bar, it being there stated (at pages 398, 399):

> "* * * We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See Olsen v. Nebraska, 313 U. S. 236, 85 L. ed. 1305, 61 S. Ct. 862, 133 ALR 1500. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

In *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, it is pointed out that, while this Honorable Court has the ultimate power to search the record in the State Courts where a claim of unconstitutionality is effectively made, it is not for it to make an independent valuation of the evidence and it can reject the determination of the State judiciary only if it can say that the evidence is

so unwarranted as to be a palpable evasion of such constitutional guaranty. It was there said, at page 294:

> "The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the State court is to transcend the limits of our authority."

Conclusion.

It is respectfully submitted that the record in this case shows that the proceedings in the California Supreme Court do not disclose any just ground for complaint and that no reviewable questions are presented by the petition for writ of certiorari or the accompanying brief of petitioners; and that the petition should be denied.

Respectfully submitted,

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